U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

INDEX

File: A29 297 448 - Dallas

Date: APR 09 1999

In re: YOLANDA SMITH-CARRANZA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Richard Fernandez, Esquire
3010 LBJ Freeway, Suite 735
Dallas, Texas 75234

ON BEHALF OF SERVICE: Mary F. Agnello
General Attorney

CHARGE:

Order: Sec. 241(a)(1)(D)(i), I&N Act [8 U.S.C. § 1251(a)(1)(D)(i)] - Conditional resident status terminated

APPLICATION: Waiver under section 216(c)(4)

I. BACKGROUND

In a decision dated October 29, 1992, an Immigration Judge found the respondent deportable as charged, denied her application for a waiver under section 216(c)(4)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1186a(c)(4)(B), and granted her voluntary departure. The respondent has appealed the denial of her waiver application. The appeal will be sustained, and the respondent's request for a waiver will be granted.

The respondent is a 34-year-old native and citizen of Mexico. The respondent married a United States citizen in Mexico on July 2, 1988. On August 19, 1988, the respondent entered the United States as a nonimmigrant visitor. On November 22, 1989, the respondent adjusted her status to that of a lawful permanent resident on a conditional basis under section 216(a)(1) of the Act.

On October 31, 1991, the respondent filed an Application for Waiver of Requirement to File Joint Application for Removal of Conditions (Form I-752), and requested waivers under sections 216(c)(4)(A) and (B) of the Act. The Service denied both applications. It did not find that the respondent had established "extreme hardship" upon deportation as required under section 216(c)(4)(A), or that she had established that her marriage had been terminated, which would be required for a waiver under section 216(c)(4)(B).

On January 30, 1992, the respondent's conditional permanent resident status was terminated. On that date, the Service issued an Order to Show Cause and Notice of Hearing (Form I-221) which charged the respondent with deportability under section 241(a)(1)(D)(i) of the Act, as an alien whose conditional permanent resident status had been terminated.

II. PROCEEDINGS BEFORE THE IMMIGRATION JUDGE

The respondent appeared before the Immigration Judge on June 6 and October 29, 1992. The respondent requested that the Immigration Judge review the denial of her waiver application under section 216(c)(4)(B) of the Act. The respondent stated that she was now eligible for the waiver because she had been granted a divorce from her husband on August 28, 1992.

The respondent testified that she was living in Mexico with her family when she met her future husband in 1987. He was an older United States citizen who had a house in Mexico, and she met him at a social event. The respondent subsequently was hired as the man's housekeeper, and she moved into his house. The couple then became romantically involved, and they married in July 1988. They had a formal wedding ceremony which was followed by a reception.

The respondent and her spouse came to the United States in August 1988. They originally planned to go to Arizona, but then her spouse decided to visit his sick mother in Texas. They remained in Texas and leased an apartment. The respondent became bored, and took employment as a housekeeper. Her husband helped her obtain work authorization.

The respondent stated that initially her husband was kind, but that after they arrived in the United States, he became very jealous and often yelled at her. Once he struck her very hard in the ribs with his elbow. The respondent decided to leave her spouse, and they separated in April 1990. The husband wanted to reconcile, but the respondent did not want to live with him any longer due to his behavior.

The respondent and her husband had originally planned to return to Mexico, and he had deposited her paychecks in a Mexican bank account. When the parties separated, the respondent's spouse did not give her any of the money. The respondent's spouse returned to Mexico in June 1990. The respondent wants to remain in the United States because she has better opportunities here, and can send money to her family in Mexico.

The respondent has four siblings and several cousins who lawfully live in the United States. The respondent's mother and four sisters live in Mexico. To support her waiver application, the respondent submitted pictures of her wedding, past employment applications which mentioned her marital status, and evidence that she had leased an apartment with her husband.

The Immigration Judge found that the respondent had established that her marriage had been entered into in "good faith." However, he found that the respondent was "at fault" in not filing a joint petition because she had decided to leave her husband against his wishes. The Immigration Judge found, in the alternative, that the respondent did not deserve a favorable

exercise of discretion because she originally intended to return to Mexico with her husband, and because she had significant family ties in her native country. The respondent has appealed these findings, and the Service has submitted a brief which adopts the decision of the Immigration Judge. [1] On review, we find that the waiver application should be granted.

III. APPLICABLE LAW

At issue is the respondent's eligibility for a waiver under section 216(c)(4)(B) of the Act. Section 216(c)(4) of the Act, which sets forth the waiver in question, provides in pertinent part that--

> The Attorney General, in the Attorney General's discretion, may remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements of [section 216(c)(1)] if the alien demonstrates that -
>
> * * *
>
> (B) the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of [section 216(c)(1)]. . . .

This same requirement is reflected in the corresponding regulations. See 8 C.F.R. § 216.5(a)(2).

IV. FINDINGS OF THE BOARD

A. The not "at fault" requirement

We first address the Immigration Judge's finding that the respondent was not eligible for the waiver because she was "at fault" in failing to file a joint petition. [2] The Immigration Judge based his determination on the fact that the respondent voluntarily left her husband over his objections, and chose to file for divorce. However, we conclude that the factual contention that the breakup of the marriage was the respondent's fault is not relevant to the question of whether the respondent was "at fault in failing to meet the requirements of [section 216(c)(1)]."

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[1]We note that the Immigration Judge's decision to grant the respondent voluntary departure has not been challenged on appeal.

[2]Because the Immigration Judge found that the respondent's marriage was entered into in good faith, and this has not been challenged on appeal, we find this element established. See I.J. Dec. at 7.

We first note that the phrase "at fault" is not defined in the relevant statute or regulation. See section 216(c) of the Act; 8 C.F.R. § 216.5. [3] Here, the Immigration Judge essentially found that the respondent is to blame for the dissolution of the marriage and that she is therefore "at fault" for failing to meet the joint petition filing requirements of section 216(c)(1) of the Act. We find that this proposed construction is precluded by the history of the waiver provision in question.

Section 216 of the Act was added by the Immigration Marriage Fraud Amendments of 1986, Pub. L. No. 99-639, 100 Stat. 3537 (1986), as part of a comprehensive statutory scheme to deter immigration-related marriage fraud. However, Congress subsequently enacted section 701(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, which amended the waiver provisions of section 216(c)(4) of the Act in several ways. See generally Matter of Balsillie, 20 I&N Dec. 486 (BIA 1992).

Prior to its amendment, section 216(c)(4)(B) provided that a waiver could be granted if the alien demonstrated that--

> the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been terminated (other than through the death of the spouse) by the alien spouse for good cause and the alien was not at fault in failing to meet the requirements of paragraph (1).

(Emphasis added). The 1990 amendments deleted the phrase underlined above, which had required the alien to have terminated the marriage for good cause. Thus, the alien spouse was no longer required to demonstrate that she initiated the termination of the marriage, and that she did so "for good cause." This change was made in part because of the difficulties aliens were experiencing in demonstrating that the marriage was terminated "for good cause." See H. Rep. No. 101-723(I), 101st Cong., 2d Sess. 51, (1990), reprinted in 1990 U.S.C.C.A.N. 6731; 56 Fed. Reg. 22,635-37 (1991).

We therefore decline to focus on the respondent's decision to terminate her relationship with her husband. Otherwise, we would be requiring the respondent to demonstrate that she was "not at fault" in the termination of her marriage. This would result in a requirement very similar to that which Congress expressly deleted from the waiver, and would be inconsistent with the history of the section of law in question. We accordingly reject it.

Rather, we examine the respondent's reason for failing to file the joint petition, which would be that her relationship had deteriorated. We find that this is a satisfactory reason for failing to file the joint petition, and point out that the joint petition would be considered to be

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[3]The legislative history of the Immigration and Marriage Fraud Amendments of 1986, Pub. L. 99-639, 100 Stat. 3537 (1986), which added section 216 to the Act, provides no useful guidance as to the meaning of the phrase. See 1986 U.S.C.C.A.N. 5978.

withdrawn once a divorce was obtained. See Matter of Mendes, 20 I&N Dec. 833 (BIA 1994). We also point out that the respondent did appear for her joint interview, but that she was estranged from her spouse and he had apparently left the country. We do not assign the negative meaning of "at fault" to these circumstances, and find that the respondent is not statutorily ineligible on this basis.

B. Discretion

The Immigration Judge did not find that the respondent deserved a favorable exercise of discretion. He referred to the fact that the respondent initially intended to return to Mexico with her spouse, and that she has close family ties in that country. On review, we do not find that these factors support an adverse discretionary finding in this case.

A discretionary determination is based on an evaluation of the favorable and unfavorable factors of record. See, e.g., Matter of C-V-T-, Interim Decision 3342 (BIA 1998) (cancellation of removal); Matter of Thomas, Interim Decision 3245 (BIA 1995) (voluntary departure); see also INS v. Yang, 117 S. Ct. 350 (1996). In the absence of adverse factors, a waiver under section 216(a)(4)(B) should ordinarily be granted in the exercise of discretion. Cf. Matter of Pula, 19 I&N Dec. 467 (BIA 1987) (asylum application); Matter of Arai, 13 I&N Dec. 494 (BIA 1970) (adjustment of status under section 245 of the Act).

In the current case, we see no adverse factors. There was some suggestion that the respondent might have been employed in the United States without work authorization, but this was not definitively established. [4] Otherwise, the respondent presented herself as a person with a solid work history, and no criminal record. The respondent has resided here since 1988, and with the passage of time, her period of residency in the United States is now a significant equity. The fact that the respondent originally planned to return to Mexico with her husband does not strike us as relevant to the discretionary determination because she changed her plans once her marriage deteriorated. In his decision, the Immigration Judge considered the respondent's divorce as indicating that she should not receive a favorable exercise of discretion. See I.J. Dec. at 8-9. Being divorced is a statutory prerequisite for eligibility under section 216(c)(4)(B), and therefore, it should not at all be considered a negative factor. Similarly, the fact that the respondent has ties to Mexico is not an outright negative factor.

In sum, we find that the respondent deserves a favorable exercise of discretion in regards to her waiver application. Accordingly, the appeal will be sustained, and appropriate orders will be entered.

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[4]Even if it had been determined that she engaged in unauthorized employment, it would have been for a brief period of time and would not be a strong enough adverse factor to dictate that a favorable exercise of discretion was unwarranted. Cf. Matter of Thomas, supra (holding that a discretionary denial of voluntary departure was appropriate where the alien had a significant history of criminal behavior).

ORDER: The appeal is sustained.

FURTHER ORDER: The decision of the Immigration Judge to deny the respondent's application for a waiver under section 216(c)(4)(B) of the Act is reversed.

FOR THE BOARD

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Dallas, Texas

File No.: A 29 297 448 October 29, 1992

In the Matter of	)	
	)	
YOLANDA CARRANZA-SMITH	)	In DEPORTATION Proceedings
	)	
Respondent	)	

CHARGE: Section 241(a)(1)(D)(i) of the Immigration and Nationality Act - conditional resident whose conditional residence has been terminated.

APPLICATION: Review of a hardship waiver based on Section 216(c)(4)(B); in the alternative, voluntary departure from the United States in the amount of three months.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Richard Fernandez, Esq.	Wayne Kimball General Attorney, USINS Dallas, Texas

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 28-year-old divorced female, a native and citizen of Mexico, who entered the United States at Eagle Pass, Texas, on or about August 19, 1988, and whose status was subsequently adjusted to that of a lawful permanent resident on a conditional basis on November 22, 1989. On January 30, 1992, the Immigration and Naturalization Service issued an Order to Show Cause charging that the respondent was deportable from the United States under the provisions of Section 241(a)(1)(D)(i) of the

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Immigration and Nationality Act, as one whose conditional residence has been terminated.

The respondent, with counsel, admitted the truth of the first seven factual allegations on her Order to Show Cause, denied the eighth factual allegation, admitted the ninth factual allegation, but denied the charge of deportability based upon the right given by regulation to have the denial of a waiver of the joint petition reviewed in deportation proceedings. The grant of such a waiver would operate to negate the respondent's deportability under Section 241(a)(1)(D)(i) pursuant to the exception contained in 241(a)(1)(D)(ii).

The statute provides that the respondent must demonstrate eligibility for the waiver and I, therefore, take it that the respondent's deportability as one whose conditional resident status has been terminated has been established by competent evidence that is clear, convincing, and unequivocal. The notice of termination has been filed with the Court (Exhibit 5) and the respondent has admitted that the termination was issued (Exhibit 1). I, therefore, find that deportability was established under Section 241(a)(1)(D)(i) of the act as required. The request for review of the waiver falls into a category that would be more appropriately considered as an application for discretionary relief, although contained in the statute as an exception to

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the relevant deportation charge, and I shall consider the request for a waiver as an application for relief, since it is discretionary, since the respondent bears the burden of proof of demonstrating that it should be granted and since the respondent also bears the burden of proof of demonstrating statutory qualification for a waiver.

The only alternative relief requested was voluntary departure in the amount of three months, and that shall be considered subsequently, if necessary.

The record establishes that the waiver was initially requested from the Immigration and Naturalization Service on both the grounds of extreme hardship and the good faith hardship waiver ground (Exhibit 4), and the decision of the Immigration and Naturalization Service deals with both of those separate grounds for the waiver (Exhibit 5). Counsel for the respondent has submitted a divorce decree showing a divorce granted August 28, 1992, to the respondent (Exhibit 6) and has indicated that the sole waiver that is being requested under the Immigration Court's review jurisdiction is the waiver based on Section 216(c)(4)(B). I have, therefore, not considered the issue of extreme hardship or a waiver under Section 216(c)(4)(A).

With respect to the waiver under Section 216(c)(4)(B), the respondent must demonstrate that the qualifying marriage was entered into in good faith by the

alien spouse, but the qualifying marriage has been terminated and the alien was not at fault in failing to meet the requirements of a joint petition. The waiver is also a discretionary waiver once statutory eligibility has been established. I believe that the review that has been assigned to the Immigration Court by the regulations is a de novo review and that it is proper to receive and consider evidence not presented to the Immigration and Naturalization Service and, therefore, find that the respondent has demonstrated that the qualifying marriage has been terminated (Exhibit 6).

With respect to the question of good faith, I note that counsel for the Immigration and Naturalization Service has argued that good faith has not been demonstrated here. The respondent testified that she met her citizen spouse in Mexico where he resided in a house that he owned sometime in 1987 at a dance, although she could not remember exactly when, and that she went to work for him as a housekeeper in his residence about a month after they had met. The respondent testified that they became romantically involved after she had gone to work for him and that this resulted in their marriage in July of 1988. The respondent testified that they came to the United States to visit his family members and for a honeymoon, and intended to go to Phoenix, Arizona, but changed their plans to visit his mother in

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Breckenridge, Texas, and then his sister in Dallas, Texas, and decided to remain in Dallas, Texas, due to the proximity of the respondent's mother-in-law at the time who was in ill health and eventually died in May of 1989.

The respondent testified that her husband secured employment in the United States and they took an apartment, and that she indicated to her husband that she was bored and wished to secure employment as well, and that he then arranged for Immigration papers to be filed for her and she secured employment cleaning apartments at the apartment complex where the couple resided. The respondent testified that they married in Mexico because she considered the spouse a fine man, but that he eventually changed and became jealous of her friends and verbally abusive. The respondent testified that she left her spouse in approximately April of 1990, moving in with a friend in the same apartment complex, and that her spouse would beg her to return but she did not, and eventually he departed for Mexico and resumed his residence there in approximately June of 1990.

The respondent testified that the couple had intended to reside in Mexico even after she had submitted her application for residence, and that all of her earnings had been sent to Mexico with that in mind. The respondent testified that she filed for divorce in 1992, approximately three months before it was granted in August of 1992, and

sometime after the Order to Show Cause was issued in January of 1992, but did not request any portion of the community property that she testified her husband had appropriated because she didn't care about the money.

There are circumstantial indications in the case that the fact that the respondent's spouse was a citizen of the United States and could perhaps enable her to get legal status in this country was one of his attractive features. The couple married in Mexico and came to the United States approximately one month later and remained, and the application for residence was filed apparently to enable the respondent to regularize employment, which she applied for shortly after her application for residence was submitted (Exhibit 12).

The respondent's testimony is that she began to consider her husband's behavior abusive at approximately the same time she received her residence in the United States. The respondent's testimony is that she had a friend in Mexico who had married a citizen of the United States and emigrated to this country in that manner sometime before her own emigration, and this friend is likewise now divorced from her citizen spouse, but apparently still residing in the United States. The respondent's testimony is that although separated and although her husband had returned to Mexico sometime in 1990, she did not file for a divorce from her

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husband until sometime in 1992, which could indicate that the existence or non-existence of the marriage was not a major issue. Finally, the respondent's testimony was that she simply did not care about the money that had been sent to Mexico and, according to her affidavit, wrongfully appropriated by her husband. However, all of this evidence is circumstantial.

Against that I have the respondent's clear testimony under oath that she married in good faith and intended to reside with her husband, and did so and attempted to make a life with him. I do not believe that the circumstantial evidence in this case that one of the attractions of the husband was his ability to enable the respondent to emigrate to the United States is sufficient to overcome the respondent's testimony that the marriage was in good faith and for the purpose of establishing a life together. I will, therefore, find that the respondent has met her burden of proof of establishing that she married in good faith.

I note, however, that at the time a joint petition was required to be filed, the respondent was still married to her citizen spouse. I note that apparently the primary cause for the failure to file the joint petition was the respondent's leaving the citizen spouse against his wishes, according to her testimony, in April of 1990. I do not

believe that the matters of marital discord testified to here today are sufficient to establish that the failure to file the joint petition was something in which the alien was not at fault where the uncontradicted testimony is that the respondent here was the one who left her citizen spouse and stayed away from her citizen spouse, notwithstanding his entreaties to resume the marriage, and remained in the United States when her citizen spouse returned to his home in Mexico as had been his intention (and, according to the testimony, the couple's intention) from the start. While the concept of not at fault under Section 216(c)(4)(B) has not been further explicated in the precedent decisions of the Board of Immigration Appeals or any of the binding decisions of Circuit Courts of Appeals in the United States, I do not believe that the record here establishes that the respondent, who was the one who left her husband, who was still married at the time the joint petition should have been filed and who did not file a joint petition because of her having left her husband, was not at fault. I, therefore, find that this element of the waiver under the statute has not been shown.

Even had that element been shown, I am not convinced that the respondent has demonstrated that she should be granted the waiver in the exercise of discretion. The respondent testified that at all times when she was with her citizen spouse, through whom she acquired her status as a

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resident, and under a section of the statute designed to allow spouses to reside together, that the couple intended to reside permanently in Mexico. The respondent still has her mother and four sisters in Mexico and testified that her relatives in the United States, that is three sisters and one brother, all reside in California. While the respondent testified that she has visited these relatives in California from Dallas, Texas, I believe she would be able to visit them from Mexico as well. The respondent's testimony indicates that there are no children of the marriage and that there are no community assets of the marriage to which she has a claim in the United States, and indeed, if there were any community assets, they have been moved to Mexico. While I have no doubt that the respondent prefers her employment opportunities in the United States, I do not believe that she has shown that she would suffer any disadvantage now should she return to Mexico compared to her situation before she met her citizen spouse and accompanied him on a visit to the United States, which turned out to be protracted.

Considering that the purpose of adjustment of status of immediate relatives to lawful permanent residents of the United States is to allow them to reside in the United States permanently with their spouses, and considering that the respondent is no longer a spouse and indeed that the intentions of the couple were at all times to return to

Mexico and reside permanently before she left her spouse, I find that even were the respondent to be not at fault and, therefore, statutorily qualified for the waiver, that she has not presented enough positive equities in her case to meet her burden of proof of showing that discretion should be exercised in her favor. For both of these reasons then, the request for a waiver of the joint petition shall be denied, and the respondent not falling under the exception to deportability contained in Section 241(a)(1)(D)(ii), is deportable under Section 241(a)(1)(D)(i).

With respect to the alternative application for voluntary departure, there is no opposition from the Government, and I find no reason not to grant that requested relief. Accordingly, the following order shall enter:

ORDER

IT IS ORDERED that the request for a waiver of the joint petition to remove conditions of residence be, and is, hereby denied on review.

IT IS FURTHER ORDERED that in lieu of an order of deportation, the respondent be granted voluntary departure without expense to the Government on or before January 29, 1993, or any extension beyond such date as may be granted by the District Director for the Immigration and Naturalization Service and under such conditions as the District Director shall direct.

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IT IS FURTHER ORDERED that should the respondent fail to depart the United States when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings, and the following order shall thereupon become immediately effective: The respondent shall be deported from the United States to Mexico, the country designated and the country of her nativity and citizenship, on the charge contained in the Order to Show Cause.

GARY D. BURKHOLDER
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before IMMIGRATION JUDGE GARY D. BURKHOLDER in the matter of:

YOLANDA CARRANZA-SMITH

A 29 297 448

Oakdale, Louisiana

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

Bhartman

(Bill Hartman, Transcriber)

Deposition Services, Inc.
600 East Jefferson Street
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November 28, 1992

(Completion Date)